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PRIOR CONSULTATION IN LATIN AMERICA SYMPOSIUM

Symposium: Prior consultation in Latin America – The Case of Bolivia

JESSIKA EICHLER — 5 October, 2015



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Legal Anthropological Experience in the Field of Indigenous Peoples

Contemporary manifestations of neo-colonialism in the form of liberal market fundamentalism have facilitated the expansion of multinational corporations and foreign investment. As a consequence of influential farming and forestry industries as well as extractive operations, indigenous peoples around the world have been dispossessed of their land, territories and natural resources.

Resulting from long-lasting negotiations the UN Declaration on the Rights of Indigenous Peoples (UNDRIPs) was adopted by the UN General Assembly in 2007. Apart from the affirmation of existing human rights the Declaration establishes a novel human rights regime that incorporates specific participatory rights in the form of prior consultation and ‘free, prior and informed consent’ (FPIC). A number of Latin-American States have increasingly adopted corresponding national legislation in order to adhere to these standards. However, recent studies reveal significant implementation gaps and ostensibly genuine forms of participation in consultation processes.

The contributions of the Mini-Symposium combine legal analysis of relevant international and regional indigenous peoples’ rights standards and ethnographic research. Theoretical considerations of indigenous peoples’ regimes are discussed in the context of several Latin American contexts: Bolivia, Peru, Colombia and Brazil in particular. Such deliberations are complemented by comparative empirical analysis of relevant consultation cases in the named States. Empirical social research experience based on case-studies will thus enhance the interdisciplinary approach of the studies. Particularly, it is empirically analysed to what extent international legal standards on indigenous peoples are implemented in practice. At the same time, definitional issues such as ‘who is indigenous’ come to the fore and reach new dimensions in the different country contexts. Other observations provide insights into current implementation challenges in Latin America and potential ways for confronting them in the future.

Lessons Learnt from the World’s ‘Consultation Role Model’: Indigenous Peoples’ Rights in the Plurinational State of Bolivia

Legal Standards Matter – Their Impact Even More So!

Bolivia's rich experience in conducting consultation processes in the hydrocarbon sector, allows us to gain in-depth insights into implementation gaps. As the first State in the world to transform UNDRIPs (UN Declaration on the Rights of Indigenous Peoples) into a national law, Bolivia faces high expectations of the international community and inhabitants of resource-rich territories. Other than its neighbouring countries Peru and Brazil, current debates go beyond definitional issues: it is focussed on the way law is enforced and keeps up with its promises instead. This triggers discussions on State and corporate conduct in consultation processes, respect for human rights standards and CSR, issues of representation, the role of the State in such processes, impacts on consultations on social structures, functions of indigenous advisors and positions that are assumed in negotiations. In the present case, indigenous peoples were consulted in five meetings with State representatives based on consultation proceedings as prescribed by the national hydrocarbons law. This contribution focuses on two case-studies on prior consultation in the Bolivian lowlands with a focus on individual members' participation in the context of my PhD research. It both includes theoretical considerations on international human rights standards at UN and Inter-American levels as well as empirical social research findings on the implementation of the said right. The focus lies on a specific weakness emerging in this new and contentious field of human rights, namely the inclusive character of prior consultation mechanisms.

Decisive Standards in Consultations: Cultural Rights and Self-Determination

International law comprises specific rights that are meant to establish safeguards in consultation processes: namely, States duties to respect indigenous peoples' right to determine structures, institutions, and representatives in accordance with their customs and traditions. Further, States need to assist indigenous peoples' governance structures and collective decision-making practices. Inter-American jurisprudence puts emphasis on non-interference and refraining from distorting social cohesion in communities. However, in practice States essentially violate such safeguards and rights, rather, new élites are raised in order to avoid opposition and conform to State interests. Selecting indigenous negotiators and bribing legitimate representatives violate indigenous consensual decision-making, their customs and traditions. Therefore, it is attempted to explore the position and degree of participation and representation in decision-making processes of consultation processes. Bribing practice and other forms of influence impede indigenous peoples in truly participating in such processes and in turn limit their collective right to prior consultation.

Implementation Gap I: Representation

International standards clearly attribute decision-making powers to indigenous peoples in deciding on representation (ILO C169, DRIPs, Inter-American jurisprudence). However, practice reveals different forms of manipulation in that regard. Firstly, indigenous advisors to the process are not institutionally supported in order to provide long-term support and continuing learning in the communities. Short-term contracts and unreliable salaries prevent sustainable approaches of knowledge distribution in the affected communities. At the same time, such posts are highly

unattractive and thus prevent applications by highly skilled personnel. Indigenous advisors thus face significant obstacles in facilitating participation and seeking negotiations on a level playing field. Secondly, indigenous leaders in the process are highly unrepresentative of their communities: local leaders are left out due to limited funding in the process. A small number of ‘consultation experienced’ leaders dominates decision-making and excludes monolingual, Guaraní speaking leaders. Further, State representatives pick and choose among leaders who would potentially support their goals.

Implementation Gap II: Information

Related to such power imbalances in decision-making structures, knowledge asymmetries are exacerbated by State practice. Language practice and technical expertise determine positions in the consultation process. For instance, indigenous oral traditions perfectly lend themselves to being marginalised in an occidental imposed process. Particularly, Guaraní speaking participants are inhibited in a Spanish environment, written agreements and technical presentations. Information is usually withheld by urban élites, rather than distributed among its members. Ironically, communities are informed in the aftermath of the ‘prior consultation’ processes. Rather than being a constituent component of the process, information is thus instrumentalised: it becomes a tool to determine participation in consultations and influence on its outcome.

Conclusion

Bolivia deserves its reputation as an ‘indigenous rights State’, a Plurinational State of Bolivia, for its progressive beginnings

in adopting standards during Morales' first term. At the same time, recent experience reveals deep restraints on the promises of law. Despite promising beginnings, the Bolivian experience demonstrates how human rights commitments on paper require detailed observation of procedures in practice. Essentially, constituent components of the indigenous peoples' right to prior consultation, such as representation and information, need to be understood in depth in order to develop best practice in Bolivia and elsewhere.

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